ORIGINAL

RECEIVED
AZ CORP COMMISSION
DOCKET CONTROL
2012 JUN 29 P 1 35

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS
GARY PIERCE, Chairman
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP
BRENDA BURNS

Arizona Corporation Commission
DOCKETED
JUN 29 2012
DOCKETED BY

IN THE MATTER OF THE APPLICATION OF BLACK MOUNTAIN SEWER CORPORATION, AN ARIZONA CORPORATION, FOR A DETERMINATION OF THE FAIR VALUE OF ITS UTILITY PLANT AND PROPERTY AND FOR INCREASES IN ITS RATES AND CHARGES FOR UTILITY SERVICE BASED THEREON.

NO. DOCKET NO. SW-02361A-08-0609

BOULDERS HOMEOWNERS' ASSOCATION'S REPLY BRIEF ON PLANT CLOSURE

The Boulders Homeowners' Association ("BHOA"), by and through undersigned counsel, submits this Reply Brief on Plant Closure.

I. THE COMMISSION'S AUTHORITY TO ISSUE A CLOSURE ORDER

A. The Commission is not constrained by what other agencies may have declared to be an appropriate level of service.

The Resort suggests that the Commission should defer to the operational standards established by ADEQ in determining whether to act to protect the public convenience, comfort, safety and health. But as separate, constitutionally-created body, the Commission's authority to protect is not constrained to what any other agency or branch of government determines to be in the public interest regarding a public service company's level of service. The Commission's authority to order the Company to close the Plant is rooted in its constitutional authority to adopt orders for the "convenience, comfort, safety and the preservation of health" of customers.[1]

The Commission has already concluded that it does not need to find a violation of

[1] A.R.S. Const. Art. XV, § 3.

an ADEQ standard before the Commission can take action to order a utility to modify its system. In Decision No. 69164 the Commission ordered changes to BMSC's sewer system, despite lack of evidence of a violation of any ADEQ requirement. Further, Arizona courts have confirmed the Commission's authority control the quality of a service a utility offers, even if that service meets the requirements established by another agency.[2] The fact that legislature has delegated specific power to another agency does not shrink the Commission's constitutionally based authority to adopt orders to protect "the convenience, comfort and safety, and preservation of health" of BMSC's customers. *Pacific Gas & Electric Co. v. State*, 23 Ariz. 81, 201 P. 632 (1921) (Commission's exercise of such authority would supersede a conflicting legislative enactment.)[3]

B. The Commission is not limited to acting only when a nuisance exists.

The Resort also notes that residents might pursue a private remedy for a nuisance even though the plant satisfies legal requirements.[4] But the Resort does not claim, and the law would not support a claim, that the Commission's authority to protect the convenience, comfort, safety and public health of BMSC's customers is at all constrained by whether a nuisance does or does not exist.[5] Thus, whether the Treatment Plant is a nuisance is irrelevant to this proceeding. However, even if standard for a nuisance as discussed by Resort did apply, interference with public health, comfort or convenience can be an adequate basis to find a nuisance.[6]

---

[2] *Ariz. Corp. Comm'n v. Palm Springs Utility Co., Inc.*, 24 Ariz. App. 124, 128, 536 P.2d 245, 249 (1975).

[3] Contrary to Resort's characterization, BHOA has not requested that the Commission make a finding that the Plant fails to conform to applicable ADEQ standards. The undisputed evidence demonstrates that the Plant dating from 1969 is not required to comply with ADEQ's setback requirements for newly constructed wastewater treatment plants, but a new plant with the same odor controls would require a setback of at least 500 feet between the treatment facility and the nearest property line of an adjacent dwelling, and that three homes are located within 100 feet of the Treatment Plant. Exhibit BHOA-6 at ¶¶ 1, 2, 14; Exhibit W-7 at R18-9-B201.

[4] Resort Initial Closing Brief at 19, citing *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 P.2d 30 (1938).

[5] BHOA has not asserted that the Company's operation of the Treatment Plant constitutes a nuisance.

[6] *See*, Resort Initial Closing Brief at 20, discussing nuisance standards set forth in *Amory Park Neighborhood Ass'n v. Episcolpal Cmty. Services in Ariz.*, 148 Ariz. 1, 712 P.2d 914 (1985).

C. Issuing a plant closure order would not be a "shocking abuse" of the Commission's authority.

The Resort asks the Commission to respect the terms of the Effluent Agreement between the Company and the Resort. That contract itself recognizes that the Commission's exercise of its duty to protect the public supersedes the Resort's expectation to continue to receive effluent from the Plant. The Commission's exercise of its authority to protect the public is not a "shocking abuse" of governmental power, as the Resort claims. Rather, it is an exercise of that authority that the Resort itself identified when it entered a contract that explicitly relieves BMSC of its obligations to provide effluent if a regulatory order results in closure of the Plant.[7] The Commission is permitted to impair contract obligations in the exercise of its power to safeguard vital public interests.[8]

The Resort further suggests that by granting the Motion, the Commission would be an improperly establishing a standard of general applicability in specialized case. But by ordering closure of the Plant, Commission would not be establishing a rule of general applicability. Rather, the Commission's order would affect only the Boulders Wastewater Treatment Plant, and not wastewater treatment plants generally. Further, the basis for the Commission's closure order would be the unique circumstances presented in this case – a pre-existing plant, the location of which was chosen more than 40 years ago by the predecessor of the party objecting to closure, which is located unusually close to residences; a plant site that was never intended to permanent; odor issues that continue despite the plant's compliance with operational standards established by ADEQ; and widespread customer support for closure. There is no evidence in the record that any

---

[7] Exhibit BHOA-3 at 5.

[8] *See, Phelps Dodge v. Ariz. Elec. Power Cooperative, Inc.*, 207 Ariz. 95, 119 ¶ 101, 83 P.3d 573, 597 (App. 2004).

other public service company in Arizona has a treatment plant located as close to homes as BMSC's plant is. In its 2009 Order, the Commission recognized that the facts and circumstances of this case are extraordinary, and an extraordinary remedy is appropriate.[9] There is nothing improper about the Commission making orders to protect the comfort and convenience of customers in an order applicable to only a single utility. To the contrary, Arizona courts have explicitly endorsed such a practice to address unique circumstances.[10]

Nor would the issuance of a closure order violate any due process right of the Resort. The Resort was on notice as early as September 2007 that BHOA intended to ask Commission to get the Plant closed.[11] From 2007 to 2010, the Resort took no action to address possible loss of effluent from the Plant.[12,13] And, to provide the Resort a further opportunity to be heard on the issue of Plant closure, the Commission permitted the Resort to intervene and fully participate in this stage of the proceeding.[14] The Resort has received all process due to it prior to a Plant closure order.

II. THE RECORD SUBSTANTIATES AN ORDER TO CLOSE THE PLANT.

Contrary to Resort's assertion, the Commission has found that closure of the Plant is appropriate in this case. In Decision No. 71865, the Commission indicated that it does "not believe that customers should be required to endure offensive odors at levels and frequencies" that customers have suffered here.[15] Even before BHOA and BMSC negotiated the Closure Agreement in 2008, the Commission expressed its desire that the

---

9 Decision No. 71865 at 54.

10 *Ariz. Corp. Comm'n v. Palm Springs Utility Co., Inc.*, 24 Ariz. App. 124, 128, 536 P.2d 245, 249 (1975).

11 Exh. W-2 at 3; as revised at Tr. pg. 71.

12 2012 Tr. at 74 (McCahan).

13 In fact, at no time since the Effluent Delivery Agreement was executed in 2001 has the Resort had in place a contingency plan regarding what it would do if the effluent from the Plant were not available. 2012 Tr. at 73 (McCahan).

14 2012 Tr. at 221.

15 Decision No. 71865 at 49.

odor issue be solved, such that all customers will be able to fully enjoy their property without having to endure offensive odors.[16]

Further the Commission has already determined that costs of the Plant's closure should be recovered from all of BMSC's customers, not only those whose homes are closest to the Plant, when it approved the surcharge mechanism in Decision No. 71865.

Finally, Commission Staff agrees that the Commission has authority to order closure of the Plant based on the facts established in this record.[17]

III. CONCLUSION

This matter presents an extraordinary set of facts, where hundreds of customers and an official Resolution from the City Council indicate broad support for closure of a wastewater treatment plant due to odors which cannot be abated absent closure of the plant. The Commission clearly has authority to order the closure of the Plant, and has previously indicated that it believed closure was appropriate to permit customers to enjoy their homes without the smell of a treatment plant. While it is unfortunate that the Resort would no longer have access to the effluent produced by the Plant, the overwhelming public interest heavily favors the Commission granting the Motion.

Dated this 26th day of June, 2012.

RIDENOUR, HIENTON, & LEWIS, P.L.L.C.

By _____
Scott S. Wakefield
201 North Central Avenue, Suite 3300
Phoenix, Arizona 85004-1052
Attorneys for Boulders Homeowners' Association

---

16 Decision No. 69164 at 37.

17 Staff's Opening Brief Regarding Rehearing of Decision No. 71865 at 5.

ORIGINAL and 13 copies filed
this 27th day of June, 2012 with:

Docket Control
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 27th day of June, 2012, to:

Janice Alward, Chief Counsel
Legal Division
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, Arizona 85007

Steven M. Olea, Director
Utilities Division
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, Arizona 85007

Dwight Nodes
Hearing Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Robin Mitchell
Attorney, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

COPY of the foregoing mailed/emailed
this 27th day of June, 2012 to:

Jay L. Shapiro
Fennemore Craig, PC
3003 N. Central Ave., Suite 2600
Phoenix, Arizona 85012-2913
Attorneys for Black Mountain Sewer Corporation
jshapiro@fclaw.com

Jodi Jerich, Director
Residential Utility Consumer Office
1110 W. Washington St., Suite 220
Phoenix, Arizona 85007-2958

Michael W. Wright
Sherman & Howard, LLC
7033 East Greenway Parkway, Suite 250
Scottsdale, Arizona 85254
Attorneys for Town of Carefree
mwright@shermanhoward.com

Michelle L. Wood
Residential Utility Consumer Office
1110 W. Washington, Suite 220
Phoenix, Arizona 85007
mwood@azruco.gov

Fredric D. Bellamy
Michele L. Van Quathem
Ryley Carlock & Applewhite, P.A.
One North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4417
Attorneys for Wind P1 Mortgage Borrower, LLC, dba The Boulders Resort
mvanquathem@rcalaw.com
fbellamy@rcalaw.com

Janet G. Betts
Sherman & Howard, LLC
7033 East Greenway Parkway, Suite 250
Scottsdale, Arizona 85254
Attorneys for Wind P1 Mortgage Borrower, LLC, dba The Boulders Resort
jbetts@shermanhoward.com

Dennis E. Doelle, D.D.S.
7223 E. Carefree Drive
P.O. Box 2506
Carefree, Arizona 85377

M.M. Schirtziner
34773 N. Indian Camp Trail
Scottsdale, Arizona 85266